

## 2013 ACTS, HOUSE FILE 586---AN OVERVIEW

### INTRODUCTION: THE POWERS OF THE ADMINISTRATIVE RULES REVIEW COMMITTEE (ARRC)

A. The issue---Rulemaking is an executive branch function.

1. Rules are derived from statutes, when rulemaking power is delegated it becomes an executive branch function----and the separation of powers doctrine comes into play.

2. Article III, §1, Iowa Constitution:

*"The powers of the government of Iowa shall be divided into three separate departments - the legislative, the executive, and the judicial: and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted."*

3. In Iowa the Separations of Powers doctrine is explicit, and placed front and center in Article III of the Iowa Constitution.

Note that the United States Constitution does not explicitly separate the legislative, executive, and judicial powers---it simply apportions specific powers to the three branches.

B. Since 1975 the Administrative Rules Review Committee (ARRC) has been given several limited powers to impact or delay agency rulemaking.

1. The Objection §17A.4(4). An objection may be imposed on *any* rule, whether proposed or in effect. It is a document outlining the committee's opinion that a rule is "unreasonable, arbitrary, capricious or otherwise beyond the authority delegated to the agency." If that rule is subsequently challenged in court, the objection strips away

the presumption of validity that is normally accorded administrative rules and forces the agency to prove the legality of the rule. If the agency fails, it must pay both the court costs and the attorney fees of the person challenging the rule.

2. The ARRC delay must be imposed BEFORE a rule goes into effect. Theory: Once a rule goes into effect it has the force and effect of law and for that reason cannot be delayed.

3. The delay is temporary. At the end of the delay the rule automatically goes into effect.

a. 70 day delay-for further study. §17A.4(7)

b. Session delay-Delay pending review by the legislature. The rule automatically goes into effect upon adjournment. §17A.8(9)

#### C. Rules nullification by the legislature.

1. possible legal support for ARRC powers.

Iowa Constitution, Article III, §40 (1984). *"The general assembly may nullify an adopted administrative rule of a state agency by the passage of a resolution by a majority of the members of each house of the general assembly."*

2. On the federal level, the United States Supreme Court has determined that a "legislative veto" is unconstitutional. *INS v. Chada*, 462 U.S. 919 (1983).

Iowa's 1984 amendment was a direct response to that decision.

3. The amendment does establish the principle that the legislative branch has some oversight responsibilities over agency rulemaking.

4. QUESTION: how much of this power can be delegated to the ARRC?

## HOUSE FILE 586

A. 2013 Acts House File 586 effectively gives the ARRC control over the emergency rulemaking process.

B. Background-The “emergency” rulemaking process.

1. The process consists of two procedures that allow agencies to place rules into immediate effect, prior to notice or public comment or publication. §§17A.4(3) and 17A.5(2)”b”.

2. House File 586 eliminates agency discretion to file emergency rules and vests approval authority with the ARRC.

3. The standard for filing an emergency rule remains the same: “notice and public participation would be unnecessary, impracticable, or contrary to the public interest.” House File 586 now requires the ARRC to make these finding, not the agency itself.

C. Three emergency rule suspensions. §17A.4(3)”a” and “b”.

1. Previous power. The ARRC has the power to sunset an emergency filed rule by filing an objection to the use of the emergency process; that sunset is effective 180 days after the objection is filed.

2. House File 586 empowers the ARRC to “suspend” the current implementation of an emergency rule, by a two-thirds vote of the ten member committee, if the ARRC has filed an objection to the emergency filing. 180 days after that action the sunset takes place and the suspended rule becomes void.

3. The Act also empowers the ARRC to suspend the effect of an emergency rule for 70 days, in order to allow time for further study.

4. The ARRC can suspend the effective date of an emergency rule until the adjournment of the next regular session of the general assembly.

- a. All suspensions require a two-thirds vote.
- b. If a session delay is imposed on an emergency rule, the rule is forwarded to the speaker of the house and the president of the senate who will forward the rule to the appropriate standing committee for further action.

D. Notice suspension. §17A.4(9). House File 586 empowers the ARRC to postpone the adoption of a notice of intended action by an agency for 70 days.

E. Delegation of rulemaking authority. §17A.23. House File 586 adds a new provision to Code chapter 17A, requiring that a delegation of rulemaking authority to a state agency is to be construed narrowly, unless the delegating statute specifically provides otherwise.

## Appendix A

### HF 586

RELATING TO THE RULEMAKING PROCESS AND STATE AGENCY  
DECISION MAKING.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

**Section 1.** Section 17A.4, subsection 3, Code 2013, is amended to read as follows:

3. a. When an agency for good cause finds that notice and public participation would be unnecessary, impracticable, or contrary to the public interest When the statute so provides, or with the approval of the administrative rules review committee, if the committee finds good cause that notice and public participation would be unnecessary, impracticable, or contrary to the public interest, the provisions of subsection 1 shall be inapplicable. The agency shall incorporate in each rule issued in reliance upon this provision either the finding and a brief statement of the reasons for the finding, or a statement that the rule is within a very narrowly tailored category of rules whose issuance has previously been exempted from subsection 1 by a special rule relying on this provision and including such a finding and statement of reasons for the entire category.

b. (1) If the administrative rules review committee by a two-thirds vote, the governor, or the attorney general files with the administrative code editor an objection to the adoption of any a rule or portion of a rule pursuant to this subsection, that the rule or portion of the rule shall cease to be effective one hundred eighty days after the date the objection was filed. A

(2) If the administrative rules review committee files with the administrative code editor an objection to the adoption of a rule or portion of a rule pursuant to this subsection, the administrative rules review committee, by a separate two-thirds vote, may suspend the applicability of the rule or portion of the rule until the rule ceases to be effective under this paragraph "b". The determination to suspend the applicability of the rule or portion of

the rule shall be included in the copy of the objection to be forwarded to the agency.

c. If an objection to a rule is filed under this subsection, a copy of the objection, properly dated, shall be forwarded to the agency at the time of filing the objection. In any action contesting a rule or portion of a rule adopted pursuant to this subsection, the burden of proof shall be on the agency to show that the procedures of subsection 1 were impracticable, unnecessary, or contrary to the public interest and that, if a category of rules was involved, the category was very narrowly tailored.

**Sec. 2.** Section 17A.4, subsection 7, Code 2013, is amended to read as follows:

7. a. Upon the vote of two-thirds of its members the administrative rules review committee may delay the effective date of a rule or portion of a rule seventy days beyond that permitted in section 17A.5, unless the rule was promulgated under section 17A.5, subsection 2, paragraph "b". ~~This provision shall be utilized by the committee only if further time is necessary to study and examine the rule.~~ If the rule was promulgated under section 17A.5, subsection 2, paragraph "b", the administrative rules review committee, within thirty-five days of the effective date of the rule and upon the vote of two-thirds of its members, may suspend the applicability of the rule or portion of the rule for seventy days.

b. Notice of an effective date that was delayed under this provision shall be published in the Iowa administrative code and bulletin.

**Sec. 3.** Section 17A.4, Code 2013, is amended by adding the following new subsection:

NEW SUBSECTION. 9. Upon the vote of two-thirds of its members, the administrative rules review committee, following notice of intended action as provided in subsection 1 and prior to adoption of a rule pursuant to that notice, may suspend further action relating to that notice for seventy days. Notice of a notice of intended action that was suspended under this provision shall be published in the Iowa administrative code and bulletin.

**Sec. 4.** Section 17A.8, subsection 9, Code 2013, is amended to read as

follows:

9. a. Upon a vote of two-thirds of its members, the administrative rules review committee may delay the effective date of a rule or portion of a rule until the adjournment of the next regular session of the general assembly, unless the rule was promulgated under section 17A.5, subsection 2, paragraph "b". If the rule was promulgated under section 17A.5, subsection 2, paragraph "b", the administrative rules review committee, within thirty-five days of the effective date of the rule and upon the vote of two-thirds of its members, may suspend the applicability of the rule or portion of the rule until the adjournment of the next regular session of the general assembly.

b. The committee shall refer a rule or portion of a rule whose effective date has been delayed or applicability has been suspended to the speaker of the house of representatives and the president of the senate who shall refer the delayed or suspended rule or portion of the rule to the appropriate standing committees of the general assembly. A standing committee shall review a the rule within twenty-one days after the rule is referred to the committee by the speaker of the house of representatives or the president of the senate and shall take formal committee action by sponsoring a joint resolution to disapprove the rule, by proposing legislation relating to the rule, or by refusing to propose a joint resolution or legislation concerning the rule. The standing committee shall inform the administrative rules review committee of the committee action taken concerning the rule. If the general assembly has not disapproved of the rule by a joint resolution, the rule shall become effective. The speaker of the house of representatives and the president of the senate shall notify the administrative code editor of the final disposition of each rule or portion of a rule whose effective date has been delayed or whose applicability has been suspended pursuant to this subsection. If a the rule is disapproved, it the rule shall not ~~become~~ be effective and the agency shall rescind the rule. ~~This section shall not apply to rules made effective under section 17A.5, subsection 2, paragraph "b".~~

**Sec. 5.** Section 17A.23, Code 2013, is amended to read as follows:

**17A.23 Construction — delegation of authority.**



1. Except as expressly provided otherwise by this chapter or by another statute referring to this chapter by name, the rights created and the requirements imposed by this chapter shall be in addition to those created or imposed by every other statute in existence on July 1, 1975, or enacted after that date. If any other statute in existence on July 1, 1975, or enacted after that date diminishes a right conferred upon a person by this chapter or diminishes a requirement imposed upon an agency by this chapter, this chapter shall take precedence unless the other statute expressly provides that it shall take precedence over all or some specified portion of this ~~named~~ cited chapter.

2. This chapter shall be construed broadly to effectuate its purposes. This chapter shall also be construed to apply to all agencies not expressly exempted by this chapter or by another statute specifically referring to this chapter by ~~name~~ citation; and except as to proceedings in process on July 1, 1975, this chapter shall be construed to apply to all covered agency proceedings and all agency action not expressly exempted by this chapter or by another statute specifically referring to this chapter by ~~name~~ citation.

3. An agency shall have only that authority or discretion delegated to or conferred upon the agency by law and shall not expand or enlarge its authority or discretion beyond the powers delegated to or conferred upon the agency. Unless otherwise specifically provided in statute, a grant of rulemaking authority shall be construed narrowly.



## Appendix B-ARRC Powers

Notice of Intended Action	<ol style="list-style-type: none"> <li>1. General Referral, 6 votes. §17A.8(7)</li> <li>2. Regulatory Analysis, 6 votes. §17A.4A</li> <li>3. Objection, 6 votes. §17A.4(6)</li> <li>4. 70 day suspension of further action, 7 votes. HF 586, §3</li> </ol>
Adopted	<ol style="list-style-type: none"> <li>1. General Referral, 6 votes. §17A.8(7)</li> <li>2. Informal Regulatory Analysis, 6 votes. No statutory authority, customary.</li> <li>3. Objection, 6 votes. §17A.4(6)</li> <li>4. 70 Day Delay, 7 votes. §17A.4 (7)</li> <li>5. Session Delay, 7 votes. §17A.8(9)</li> </ol>
Adopted and Filed Without Notice	<ol style="list-style-type: none"> <li>1. <b>Mandatory prior approval by ARRC, 6 votes. HF 586, §1</b></li> <li>2. General Referral, 6 votes. §17A.8(7)</li> <li>3. Regulatory Analysis, 6 votes. §17A.4A</li> <li>4. Objection, 6 votes. §17A.4(6)</li> <li>5. 180 Day Sunset Objection, 7 votes. §17A.4(3)</li> <li>6. Suspension of applicability until 180 sunset, 7 votes. HF 586, §1</li> </ol>
Adopted and Filed Emergency	<ol style="list-style-type: none"> <li>1. <b>Mandatory prior approval by ARRC, 6 votes. HF 586, §1</b></li> <li>2. General Referral, 6 votes. §17A.8(7)</li> <li>3. Regulatory Analysis, 6 votes. §17A.4A</li> <li>4. Objection, 6 votes. §17A.4(6)</li> <li>5. 180 Day Sunset Objection, 7 votes. §17A.4(3)</li> <li>6. Suspension of applicability until 180 sunset, 7 votes. HF 586, §1</li> <li>7. 70 Day suspension of applicability, 7 votes. HF 586, § 2</li> <li>8. Session suspension of applicability, 7 votes. HF 586, § 4</li> </ol>
Adopted and Filed Emergency After Notice	<ol style="list-style-type: none"> <li>1. General Referral, 6 votes. §17A.8(7)</li> <li>2. Regulatory Analysis, 6 votes. §17A.4A</li> <li>3. Objection, 6 votes. §17A.4(6)</li> <li>4. 70 Day suspension of applicability, 7 votes. HF 586, § 2</li> <li>5. Session suspension of applicability, 7 votes. HF 586, § 4</li> </ol>
Notice of Termination	No Action.
Rules in effect (by special review)	<ol style="list-style-type: none"> <li>1. General Referral, 6 votes. §17A.8(7)</li> <li>2. Informal Regulatory Analysis, 6 votes. No statutory authority, customary.</li> <li>3. Objection, 6 votes. §17A.4(6)</li> </ol>
Any rules-related matter	ARRC-approved Legislation, 6 votes, 3 from each chamber. Joint Rule 19.

**SUSPENSION OF NOTICE-HF 586, §3. Seven votes required.**

The committee, following Notice of Intended Action, may suspend further action relating to that notice for seventy days.

**REGULATORY ANALYSIS-§17A.4A. Six votes required.** Each regulatory analysis must include quantifications of the data and must take account of both short-term and long-term consequences. An agency must issue a regulatory analysis of a proposed rule if an appropriate request is made within thirty-two days after the notice is published. When an analysis has been requested the agency must extend the time for public comment on the proposed rule for twenty days beyond the date a summary of the analysis is published in the IAB.

**INFORMAL REGULATORY ANALYSIS-No statutory authority, customary. Six votes required.** The committee has on occasion informally requested an agency to conduct a regulatory analysis of a rule after the statutory period for requesting a regulatory analysis pursuant to § 17A.4A has elapsed. This may include a rule that is already in effect. While a statutory regulatory analysis will typically be extensive and take a significant amount of time to complete, an informal regulatory analysis may be more simple and concise for the purpose of conveying information to the committee in a timely manner. An agency will typically comply with such a request without issue.

**GENERAL REFERRAL-§17A.8. Six votes required.** The committee may refer *any* rule, whether proposed or in effect, to the General Assembly for further study. This power does not impact the enforceability or legality of the rule; it is simply a mechanism to bring a rule-making issue to the attention of the legislature. A letter is prepared summarizing the issue and sent to the Speaker of the House and President of the Senate. Those officers then forward the material to the appropriate standing committees. Any additional action is discretionary with the standing committee members.

**OBJECTION-§17A.4(6)-Six votes required.** An objection may be imposed on *any* rule, whether proposed or in effect. It is a document outlining the committee's opinion that a rule is "unreasonable, arbitrary, capricious or otherwise beyond the authority delegated to the agency." If that rule is subsequently challenged in court, the objection strips away the presumption of validity that is normally accorded administrative rules and forces the agency to prove the legality of the rule. If the agency fails, it must pay both the court costs and the attorney fees of the person challenging the rule.

**THE "EMERGENCY" RULE APPROVAL- HF 586, §1. Six votes required.** The committee must approve the filing of a rule that is either adopted and filed emergency or adopted and filed without notice, pursuant to Code §17A.4(3). To the extent practicable, these approval reviews will be scheduled during the regular monthly meeting. When necessary the committee will schedule a special telephonic conference.

**THE "EMERGENCY" RULE OBJECTION-§17A.4. Seven votes required.** The committee can object to the "emergency" filing of a rule and sunset the rule after 180 days. At one time *all* emergency rules were temporary, but the problem was that a large majority of these filings were

appropriate and should be left in effect. The solution was to make "emergency" rules permanent; but in those cases where abuse occurs, the committee is empowered to transform them into temporary rules by filing the objection. This procedural objection is not necessarily an attack on the rule itself; it is an attack on the procedure used to implement the rule.

**THE "EMERGENCY" RULE SUSPENSION-House File 586, §1. Seven votes required.** If the committee objects to the "emergency" adoption of a rule, the committee may also suspend the applicability of the rule until the 180 sunset.

**SESSION DELAY-§17A.8(9). Seven votes required.** A session delay may be imposed only before the effective date of the rule has passed. It postpones the effective date of the rule, or a designated portion of a rule, until the adjournment of the next session of the General Assembly. A letter is prepared summarizing the issue and is sent to the Speaker of the House and President of the Senate. Those officers then forward the material to the appropriate standing committees. Any additional action is discretionary with the committee members. If the legislature takes no action, the rule automatically goes into effect upon adjournment.

**EMERGENCY RULE SESSION SUSPENSION- HF 586, § 4. Seven votes required.** Within thirty-five days of its effective date, an emergency rule may be suspended until the adjournment of the next session of the General Assembly. A letter is prepared summarizing the issue and is sent to the Speaker of the House and President of the Senate. Those officers then forward the material to the appropriate standing committees. Any additional action is discretionary with the committee members. If the legislature takes no action, the rule automatically goes into effect upon adjournment.

**SEVENTY DAY DELAY-§17A.4(5). Seven votes required.** A seventy day delay may be imposed only before the effective date of the rule has passed. It is simply a tool to buy more time to review a proposed rule. It is most frequently used to create a "cooling off" period before the committee takes more drastic action, giving interested persons an opportunity to reach compromises or solutions. At the end of the period, the committee meets again to review the filing and retains all of its original powers. This power is used frequently by the committee.

**EMERGENCY RULE SEVENTY DAY SUSPENSION-HF 586, § 2. Seven votes required.** Within thirty-five days of its effective date, an emergency rule may be suspended for seventy days. A seventy day delay serves a function similar to a seventy day delay.

**SPECIAL REVIEW-§17A.8(6). By request.** Section 17A.8(6) provides that "[t]he committee shall meet for the purpose of selectively reviewing rules, whether proposed or in effect." There is no statutory procedure for how the committee reviews rules that are in effect; typically a committee member who would like the committee to review a rule that is in effect will submit the request to the chair, who will then add the request to the committee's next agenda. Notice will be provided to the appropriate agency

that the agency will be expected to have a representative present at the meeting to review the rule. So that the agency will have adequate time to prepare for such a review, it is advisable to submit a request for a special review at least a week before the committee's monthly meeting. Actions the committee may take on a rule that is already in effect are limited; the committee can make a general referral, impose an objection, or request an informal regulatory analysis.

**ARRC LEGISLATION-Joint Rule 19.** Six votes required, majority of each house. The Committee may introduce a bill relating to rules into either house, at any time. The bill must be referred to a standing committee, which must take action on the bill within three weeks of referral, except bills referred to appropriations and ways and means committees. ARRC bills are exempt from the funnel.

**WHY DO SOME COMMITTEE ACTIONS REQUIRE SEVEN VOTES?** The power to delay the effective date of a rule impinges upon the constitution role of the executive branch. Article III, § 1 of the Iowa Constitution states:

"The powers of the government of Iowa shall be divided into three separate departments — the legislative, the executive, and the judicial: and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted."

The supermajority requirement ensures that the Committee will not act precipitously in exercising these powers.